

### 3 | Unforeseen circumstances after enforcement or expiry of the contract, prescription and forfeiture of rights

*Henk Snijders* <sup>■</sup>

#### 1 A CASE

A and B agree to a joint venture for the common exploitation of A's coal plant during the years 2001-2010. The agreement provides among others that B will every year pay half of the depreciation for the plant estimated at € 90 million a year. At the moment when the parties agreed on that amount, they assumed that the coal plant would have an operating time of 15 years, because the government had decided to stop all coal plant exploitations from 2016. After the expiry of the contract the government changes its decision: meanwhile it is of the opinion that the exploitation of nuclear power plants must be stopped and that coal plants can serve as an alternative for some decades yet. The operating time of the coal plant is now estimated to be 30 instead of 15 years. Consequently, B claims modification of the contract, arguing that the huge extension of the operating time is an unforeseen circumstance and that therefore the contract has to be modified. A argues that the contract has already been enforced and expired, and that judicial modification of the contract is therefore not acceptable anymore.

What to think of A's position, assuming that the huge extension of the operating time is, as B argues, an unforeseen circumstance?

#### 2 THE QUESTIONS

Article 6:258 DCC (Dutch Civil Code) states, among others, that the court may modify (the effects of) a contract or set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, 'may not expect the contract

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■ Henk Snijders is professor of Private Law and Civil Procedure, Leiden University (h.j.snijders@law.leidenuniv.nl). The author wishes to express his gratitude for the documentary support of his students ms. Elsemieke Daalder and ms. Emma van der Wiel.

to be maintained in unmodified form'<sup>1</sup> (in Dutch: 'ongewijzigde instandhouding van de overeenkomst niet mag verwachten').

The word 'maintained' suggests at least that the contract still exists at the moment when modification or setting aside is claimed, and that the contract is still valid then. Indeed it can be held that a contract which is non-existent or null cannot be modified on the basis of art. 6:258 DCC: there is nothing to be changed anymore. The same applies to a contract which has been annulled, at least if the annulment has been given retroactive effect to the time the contract was agreed for, as usually occurs on the basis of art. 3:53 DCC. An interesting question remains whether a valid and unannulled contract for a definite period can be changed or set aside on the basis of unforeseen circumstances, if it has been enforced or has expired because that period is past. And that is the central issue in this article. At the end the same question will be considered shortly for some contracts which have expired in another specific way: a) valid contracts for an indefinite period after termination of the contract, b) contracts which have been subjected to annulment without retroactive effect to the time the contract was agreed and c) contracts which have been set aside on account of breach of contract. Furthermore, some attention will be given then to the prescription of a claim for the setting aside or modification of such a contract on the basis of unforeseen circumstances and to the possibility of forfeiture of rights.

### 3 TEXT AND HISTORY OF ART. 6:258, FOREIGN AND TRANSNATIONAL LAW

The text of art. 6:258 does not explicitly give an answer to the questions dealt with here. We will see that the text does give an interesting indication, but first some attention to parliamentary history may be useful.

The text of art. 6:258 DCC may not explicitly answer the questions dealt with, nor does it preclude application to a contract which has been enforced in part or even entirely, as the main author of the code, E.M. Meijers, explains the original draft of the article (which draft was not changed during the parliamentary discussion on it, as far as relevant now, for that matter).<sup>2</sup> Meijers adds (l.c.) that the application is especially important with regard to a contract which has been enforced only partly (i.e. the contract has not been enforced by all the parties or the obligations out of the contract have been enforced only

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1 The quotation is from the translation by H. Warendorf et al., *The Civil Code of the Netherlands*, Kluwer Law International: Alphen aan de Rijn 2009. The translation by P.P.C. Haanappel and E. Mackaaij (*New Netherlands Civil Code/Nouveau Code Civil Néerlandais*, Kluwer Law and Taxation: Deventer/Boston 1990) differs only very slightly from that of Warendorf et al. Both translations correctly underline that the question, whether the contract has to be maintained in an unmodified form, is at stake (the verb to maintain means 'handhaven' or 'in stand houden' and corresponds to the substantive 'instandhouding').

2 Toelichting Meijers, *Parlementaire Geschiedenis Boek 6*, pp. 969-970.

partly). The modification or setting aside of an agreement which has been enforced entirely, will seldom be in accordance with reasonableness and fairness, Meijers holds.<sup>3</sup> The question what to think of this last observation will be considered later on. Now, it is relevant to stress that this is not a fundamental objection to the modification or setting aside of a contract which has already been entirely or partly enforced, on the basis of unforeseen circumstances. On the contrary, Meijers seems to adopt such modification and setting aside, in principle. What applies to a contract enforced entirely, must also be applicable to (other) contracts which have expired. There is no reason to assume that Meijers would have another view with regard to those contracts. Especially the wording of art. 6:258 that regards the question whether an existing contract has to be 'maintained', does not give a reason for that assumption. The expiry of a contract from a certain date does not make it disappear, it is still maintained. Then the question arises whether that contract still has to be maintained for the period up till the expiry date.

Furthermore, the second sentence of art. 6:258 par. 1, which has been added to the bill on Book 6 DCC while it was pending in parliament, indicates that the judicial modification of entirely or partly enforced contracts is possible. It permits retroactive effect of a judicial modification or setting aside to any moment before the date of such judicial modification or setting aside. That moment may be the date of a procedural document, such as a writ of summons or a statement of defence, in which the possibility of modification or setting aside because of unforeseen circumstances has been invoked in a concrete case. It may also be situated before the civil procedure. Retroactive effect even seems to be possible from the date of establishment of the contract itself. There is no indication that the legislator would have been willing to limit the retroactive effect to a certain period. Retroactive effect up to the date of the contract will seldom be in accordance with reasonableness and fairness, Meijers could hold, again, which will be also discussed later on. Important now is that retroactive effect is permitted for -among others- contracts which have only been enforced entirely or in part. Again, it may be held that what applies to a contract enforced entirely must also be applicable to (other) contracts which have expired. Therefore the second sentence of art. 6:258 par. 1 also suggests, albeit slightly, that the judicial modification and setting aside of a contract which has expired, is possible.

Summarizing, the legislator does not see any fundamental objections to the judicial modification and setting aside of contracts already enforced or expired. Meanwhile, he is of the view that the modification or setting aside of a contract which has been entirely enforced will seldom be in accordance

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3 Meijers refers to Karl Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 1. Auflage, Beck: München-Berlin 1951, p. 91 ff. See further, inter alia John Cartwright, *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer*, Hart Publishing: Oxford and Portland, Oregon 2007, p. 235, is of the same opinion.

with reasonableness and fairness. Whether that last observation can be applied to expired contracts *per analogiam* is another question. Both observations will be considered in more detail under 4.

What about foreign laws? Provisions of foreign law do not explicitly deal with the judicial modification and setting aside of contracts already enforced or expired, as far as could be investigated. The same can be held for the UNIDROIT Principles of International Contracts (UNIDROIT) and the Principles of European Contract Law (PECL): neither the UNIDROIT Principles nor the PECL give a clear indication of the answer to our questions. See arts. 6.2.1-3 UNIDROIT and art. 6:111 PECL. The same applies to art. III – 1:110 of the Draft Common Frame of Reference (DCFR), which is similar to arts. 6.2.1-3 UNIDROIT. All these texts give no explicit indication for a positive answer to the question, but there is no opposition to the judicial modification or setting aside of enforced or expired contracts on the basis of unforeseen circumstances either. A general investigation of foreign case law and literature on domestic provisions, transnational principles and the DCFR did not really help to interpret these rules. Foreign and transnational law will be left aside further.

#### 4 MEANING OF REASONABLENESS AND FAIRNESS IN CASE OF CONTRACTS ENTIRELY OR PARTLY ENFORCED OR EXPIRED

As pointed out under 3 the modification and setting aside of an agreement which has been enforced entirely, will seldom be in accordance with reasonableness and fairness, in Meijers's view. It is not clear what exactly Meijers means in this respect. Maybe the underlying idea is that the severer the consequences of modification or setting aside (in the sense of the effect of a reversal of what has already been done), the greater the chance that such modification or setting aside will not be in accordance with reasonableness and fairness. However, the reason for modification or setting aside on the basis of unforeseen circumstance is precisely that the consequences of maintenance of the contract in unmodified form are so serious that the counter-party of the person who seeks the modification or setting aside may not expect maintenance in unmodified form and it is clear that a modification or setting aside on that basis will not only be effected in details but in a substantial way. It is clear nevertheless that the judge dealing with the claim for modification or setting aside will also consider the negative consequences of it for the other party and calculate the extent of that disadvantage for that party as a factor in weighing the interest of the parties with regard to the question whether the other party may expect the contract to be maintained without modification, and if not allowed to expect so, to what extent the modification must be accepted (the concept of 'claim' is intended as a quite general one here: the modification and setting aside can also be informally demanded by the defendant, as will be pointed out and discussed under 6). In other words, it can

be held that the application of the legislator's criteria of reasonableness and fairness to a claim for modification and setting aside of an agreement which has been entirely enforced or has expired requires a careful consideration of the advantages and disadvantages of such modification or setting aside for both parties to the contract. That can be held both with respect to the question whether the claim has to be granted and – in case of an affirmative answer to that question – to what extent the claim for modification or setting aside has to be granted. The latter question is also an important one. The modification or setting aside can be applied only to a part of the subject of the contract, for instance, or only without retroactive effect or with limited retroactive effect.

That test against the requirements of reasonableness and fairness is not an ordinary but a marginal one: the judge is only allowed to modify or set aside the contract if and insofar as it is *unacceptable* in the light of the requirements of reasonableness and fairness to keep a party to unmodified maintenance of the contract. After all, art. 6:258 DCC is a codification of a specific rule which was derived from art. 1374 par. 3 of the Old Civil Code, which, according to case law under the Old Civil Code, provided in general for the so-called contract-limiting effect of reasonableness and fairness, as art. 6:248 par. 2 DCC does now: a rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be *unacceptable* according to standards of reasonableness and fairness.<sup>4</sup> Therefore, the judge has to apply the legislator's authorization to modify or set aside a contract on the basis of unforeseen circumstances with restraint and caution, i.e. only in exceptional situations.<sup>5</sup> In practice, it occurs very seldom indeed that the judge modifies or sets aside a contract on the basis of unforeseen circumstances.<sup>6</sup>

Altogether it may be concluded that the modification and setting aside of contracts on the basis of unforeseen circumstances are only appropriate in exceptional situations: it is only allowed if, and if so to the extent that, unmodified maintenance of the contract is absolutely unacceptable according to the requirements of reasonableness and fairness. There is no good reason in principle to make it still more difficult in case of a contract which has been enforced entirely or has expired.

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4 Cfr. Voorlopig Verslag II and Memorie van Antwoord II, Parlementaire geschiedenis Boek 6, p. 971 resp. pp. 973-975. See further, inter alia Asser/Hartkamp & Sieburgh 6-III\* (2010), nr. 439.

5 Memorie van Antwoord, Parl. gesch. Boek 6, PG. See further, inter alia Asser/Hartkamp & Sieburgh 6-III\* (2010), nr. 444, *Rechtshandeling en overeenkomst* (W.L. Valk), Kluwer: Deventer 2007, nr. 288 and Attorney-General Wuisman in his 'conclusie' (official advice to the court) in the case of Dutch Supreme Court 15 February 2008, *NJ* 2008, 110.

6 See for instance Dutch Supreme Court 19 November 1993, *NJ* 1994, 156, Dutch Supreme Court 20 February 1998, *NJ* 1998, 493 and Dutch Supreme Court 21 March 2003, *NJ* 2003, 591, with commentary from JBMV.

A fortiori, there is no good reason for making it more difficult in case the contract has been enforced in part.<sup>7</sup> On the contrary, modification or setting aside of a contract on the basis of unforeseen circumstances will just be claimed very often, maybe even in the large majority of the cases, with regard to contracts which have already been enforced in part. The legislator must certainly have been willing to provide for the modification and setting aside of such contracts.<sup>8</sup>

5      MODIFICATION OR SETTING ASIDE ON THE BASIS OF UNFORESEEN CIRCUMSTANCES AFTER TERMINATION OF THE CONTRACT, ANNULMENT WITHOUT RETROACTIVE EFFECT AND SETTING ASIDE ON THE BASIS OF BREACH OF CONTRACT

What to think of the modification or setting aside of a contract on the basis of unforeseen circumstances after termination of a contract for an indefinite period? In fact the termination of the contract, if valid of course, transforms the contract for an indefinite period to a contract for a definite one. There is no difference between both types, except that the former is definite from the beginning while the latter is made definite in the course of its duration. It may be held that the answers to the questions as given before also apply to indefinite contracts which have been terminated and therefore expired.

Now for the case of a contract which has been subjected to annulment without retroactive effect to the time the contract was agreed. A contract does not disappear as a result of an annulment. It is still maintained, albeit only for the period from the date of agreement up till the date of annulment or a date in between insofar as limited retroactive effect is given to the annulment. Therefore such an annulled contract must be susceptible to modification and setting aside on the basis of unforeseen circumstances arisen after the annulment, albeit it only for the remaining period of the contract.

Finally a look at contracts which have been set aside on account of breach of contract. Such setting aside does not have retroactive effect according to present Dutch law (art. 6:269 DCC). Still, the setting aside releases the parties from the obligations effected by it (art. 6:271, first sentence DCC). However, to the extent that these obligations have already been performed, the legal ground for this performance remains intact, albeit that the parties have the obligation to reverse the performance of the obligations already performed

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7 The Court of Appeal in 's-Hertogenbosch appeared to be of another view, without mentioning any argument therefor (Court of Appeal 's-Hertogenbosch 11 April 2006, *NJF* 2006, 500). On the other hand, the Court of Appeal of Arnhem seems to be in favour of the author's opinion, albeit that it does not give any reasons for that either (Court of Appeal Arnhem 14 July 2009, *LJN* BK6402).

8 See also P.S. Bakker and J.W. de Groot, *WPNR* 2009 (6797) under 5.

(art. 6:271, second sentence DCC) or at least to compensate therefor by paying damages in case the performance, given its nature, cannot be reversed (art. 6:272 DCC). Therefore, there is no interest for any party in the modification or setting aside of a contract on the basis of unforeseen circumstances after that contract has been set aside entirely on account of breach of contract. Only in case of a partial setting aside on account of breach of contract (as art. 6:265, par. 1 DCC in conjunction with art. 6:270 DCC permits respectively elaborates) can such an interest still be there and if so, there is no reason why modification or setting aside on the basis of unforeseen circumstances would not be allowed then.

## 6 PRESCRIPTION AND FORFEITURE OF RIGHTS

The interim conclusion may be that the modification and setting aside of a contract is possible on the basis of unforeseen circumstances arisen after the enforcement or expiry of the contract. However, it is possible, of course, that a claim for modification or setting aside in this matter is prescribed. Furthermore, it is possible that a claim in this matter will founder on forfeiture of the right of action. Some remarks on these possibilities have to be made now, but first some attention has to be paid to the concept of 'claim' in this matter.

As stated before, the concept of 'claim' is intended as a quite general one. The original draft provision on modification and setting aside on the basis of unforeseen circumstances allowed the interested party to institute court proceedings for the modification and setting aside of a contract on the basis of unforeseen circumstances by using the word 'vordering', i.e. a claim by the original claimant in the action or by the defendant bringing a counterclaim. In the final text of art. 6:258 DCC the word 'vordering' was changed by the more neutral word 'verlangen' (i.e. demand), in order to provide not only a possibility for a person to bring civil proceedings for the judicial modification or setting aside of a contract on the basis of unforeseen circumstances, but also by way of defence for the defendant or by way of an answer to a defence for a claimant in a civil action for another claim. However, this change of words was not necessary to achieve that the defendant or the claimant can, by way of an answer to a defence in a civil action for another claim, seek to gain a judicial modification or setting aside of a contract on the basis of unforeseen circumstances. This modification or setting aside can be achieved by a counterclaim of the defendant respectively an additional claim of the original claimant (these being claims in a narrow sense). Obviously the legislator still wants to allow the possibility of seeking the judicial modification or setting aside of a contract on the basis of unforeseen circumstances via another route, notably by way of an informal demand by the original claimant or the de-

fendant. What are we to think of this informal demand in connection with the question of prescription?<sup>9</sup>

The legislator probably did not realise that through his use of the concept of an informal demand, claimants and defendants could try to circumvent the prescription. On the basis of the legislator's wording, curious results in the field of prescription could occur. What to think of an informal demand of a claimant after prescription of his right of action (i.e. the *ius agendi*) for instance? Whereas a claim for the judicial modification or setting aside of a contract on the basis of unforeseen circumstances should be dismissed due to that prescription, an informal demand later on in the procedure should be admissible. Still, there is a strong need for prescription of a 'right of informal demand' after a long time as well. Legal certainty is involved here, as it is involved with regard to the prescription of claims in a narrow sense. Therefore, in the author's opinion, the informal demand has to be dealt with in the same way as a claim in a narrow sense. For both of these it must be held that the right to initiate the judicial modification or setting aside of a contract on the basis of unforeseen circumstances must be interpreted as the right of action in the sense of the Dutch law of prescription. Thus, the right of an informal demand to the judge in the sense of art. 6:258 DCC can be prescribed on the same conditions as a right of action in a narrow sense.

However, there is no specific provision on that right of action with regard to the judicial modification or setting aside of a contract on the basis of unforeseen circumstances in Dutch law. There is still a specific provision on the prescription of a right of action to set aside a contract (art. 3:311 DCC), but this provision only refers to setting aside for failure to perform. That is why the general provision on prescription of rights of action is applicable (art. 3:306) which states that unless otherwise provided for by law, a right of action is prescribed on the expiry of twenty years. From what moment does this term start? From the moment the unforeseen circumstances occur or the moment when the interested party is aware of these circumstances? Keeping in mind the length of the period, the former option seems to be the most appropriate one, but there is no indication for it in the text or in the history of the law. However, even in that former sense, the 20-year period is an extremely long one in the author's opinion. The right of action to set aside a contract for nonperformance is prescribed on the expiry of five years from the moment when the creditor becomes aware of the failure and only in other situations on the expiry of twenty years after the failure occurred (art. 3:311 DCC). There is no reason why a right of action to the judicial modification or setting aside of a contract on the basis of unforeseen circumstances should not be dealt with in the same way, *mutatis mutandis*. The prescription would be better fixed on five years from the moment when the interested party becomes aware of the

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<sup>9</sup> See more in general for instance H.J. Snijders et al., *Nederlands burgerlijk procesrecht*, Kluwer: Deventer 2011, no. 126.



originally unforeseen circumstances and in any case not more than twenty years after the originally unforeseen circumstances occurred. It looks as if the legislator simply forgot to make a specific prescription provision on rights of action with regard to unforeseen circumstances, possibly due to the fact that the old Code did not provide for a right of action as laid down in the present art. 6:258 DCC. Anyway, the *ius constitutum* does not provide for such a limited prescription period. Perhaps our Dutch Supreme Court is willing to interpret art. 3:311 *per analogiam* in the sense argued just now, but it is not sure whether it will do so.

However, as far as prescription is not at stake, the right of action can be forfeited. This will be the case if in the given circumstances, according to standards of – again – reasonableness and fairness, it cannot be accepted anymore that a right of action is used. In that case the right of action expires as well, as in case of prescription. This forfeiture of rights has not been laid down in Dutch legislation, but was adopted by the Dutch Supreme Court under the old Civil Code and is still accepted by the Dutch Supreme Court under the present one.

There is no occasion for an elaborate analysis of Dutch legal criteria for forfeiture of rights now. Some remarks may suffice. According to case law, neither the simple expiry of a certain period after a certain event nor simply sitting around doing nothing is enough for the reception of forfeiture. Forfeiture of rights is only accepted in two situations. It is accepted if under the specific circumstances of a case the debtor suffers an unreasonable disadvantage if the creditor would, after a certain period, still invoke his right of action. It is also accepted if the debtor correctly trusted that the creditor would not invoke his right of action anymore.<sup>10</sup> Application of this general rule to the right of action to the judicial modification or setting aside of a contract on the basis of unforeseen circumstances means that this right of action can be forfeited a) if the debtor suffered an unreasonable disadvantage in case the creditor, after a certain period, still invoked his right of action to modification or setting aside and b) if the debtor was allowed to trust that the creditor would not invoke his right of action anymore. In general, it is clear that the longer a prescription period is, the sooner the judge will dismiss a claim because of forfeiture of rights. An example of the latter may be found in the situation in which a debtor, from the moment he is conscious of a certain, hitherto unforeseen circumstance, still, without any objection, continues to enforce the agreement, for instance through the continuous annual payment, without any objection, of the agreed amount for depreciation costs as could occur in the case of section 1 *supra*.

The question of the forfeiture of rights precedes the substantive treatment of a claim for the judicial modification or setting aside of a contract on the

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10 See further for instance *Verbintenissenrecht* (W.L. Valk), loose-leaf and e-edition, Kluwer: Deventer, art. 2, notes 1 ff.

basis of unforeseen circumstances, because in case of forfeiture the claim will not be admissible. The substantive treatment of that claim is not at stake anymore in that case. However, the arguments in favour of forfeiture in a certain case can be, entirely or partly, the same as the arguments in favour of rejection of the claim for the judicial modification or setting aside of a contract on the basis of unforeseen circumstances. This phenomenon is not that strange. Both legal concepts – judicial modification or setting aside of a contract on the basis of unforeseen circumstances and forfeiture of rights of action – have a common assessment framework: the tandem of reasonableness and fairness in its correcting function as laid down in art. 6:2 par. 2 DCC and art. 6:248 par. 2 DCC.

## 7 SUMMARY AND FINAL REMARKS

It is clear now, how the case of section 1 should be decided. The single fact that the contract has already been (entirely or partly) enforced or has already expired does not prevent a judicial modification or setting aside of the contract. A's argument that the contract has already been enforced and expired, and that judicial modification of the contract is therefore not acceptable, fails.

However, the enforcement and expiry arguments are still relevant. A's claim for the modification or setting aside of a contract on the basis of unforeseen circumstance can be granted and can be granted only if the consequences of maintenance of the contract in unmodified form are so serious that the counter-party of the person who wants the modification or setting aside may not expect maintenance in unmodified form. The judge, dealing with such a claim for modification or setting aside, will also consider the negative consequences of it for the counter-party and calculate the extent of that disadvantage for that party as a factor in weighing the interest of the parties with regard to the question whether the counter-party may expect the contract maintained without modification, and if it is not allowed to expect so, to what extent the modification must be accepted. It can be held that the application of the legislator's criteria of reasonableness and fairness to a claim for the modification and setting aside of an agreement which has been entirely enforced or has expired, requires a careful consideration of the advantages and disadvantages of such modification or setting aside for both parties to the contract. It can be held both to the question whether the claim has to be granted and – in case of an affirmative answer to that question – to what extent the claim for modification or setting aside has to be granted.

That test against the requirements of reasonableness and fairness is not an ordinary but a marginal one: the judge is only allowed to modify or set aside the contract if and insofar as it is *unacceptable* in the light of the requirements of reasonableness and fairness to keep a party to unmodified maintenance of the contract. Modification and setting aside of contracts on the basis

of unforeseen circumstances are only appropriate in exceptional situations: it is only allowed if and insofar as unmodified maintenance of the contact is absolutely unacceptable according to the requirements of reasonableness and fairness.

Questions of prescription and forfeiture of rights precede the substantial question whether a claim for modification or setting aside of a contract on the basis of unforeseen circumstances has to be granted. Prescription is not often an issue in practice, due to the long prescription period (20 years). Forfeiture of rights is at stake more. The right of action to judicial modification or setting aside of a contract on the basis of unforeseen circumstances can be forfeited if the debtor was allowed to trust that the creditor would not invoke his right of action anymore or if this put the debtor at an unreasonable disadvantage.

